

DOCKET NO.: CV-14-6023180S : **SUPERIOR COURT**
ROBIN SHERWOOD and
GREG HOELSCHER : **J.D. OF STAMFORD**
V. : **AT STAMFORD**
STAMFORD HEALTH SYSTEM, INC.
D/B/A STAMFORD HOSPITAL : **SEPTEMBER 19, 2014**

MEMORANDUM OF LAW IN SUPPORT OF
STAMFORD HEALTH SYSTEM, INC.’S MOTION TO STRIKE

Stamford Health System, Inc. (“Stamford Hospital”), by its counsel, Neubert, Pepe & Monteith, P.C., respectfully submits this Memorandum of Law in support of its Motion to Strike.

STATEMENT OF FACTS

Robin Sherwood was operated on at Stamford Hospital on April 21, 2006 (almost eight and a half years ago). ¶47, Complaint. She has brought a single count complaint under Connecticut’s Product Liability Act (the “CPLA”) against Stamford Hospital. During the surgery, unspecified “pelvic mesh products” were “implanted” into Ms. Sherwood. ¶18, Complaint. The Complaint does not allege the name of the doctor who operated on Ms. Sherwood. The purpose of pelvic mesh is to “treat” “medical conditions in the female pelvis, primarily organ prolapse and stress urinary incontinence.” ¶11, Complaint. The Complaint mentions various types of pelvic mesh including products that were created years after Ms. Sherwood’s surgery. ¶15, Complaint. The Complaint contains allegations about pelvic mesh manufacturers named Ethicon, Inc. (“Ethicon”) and American Medical Systems, Inc. (“AMS”) who apparently manufactured the unspecified vaginal mesh at issue. ¶¶5-21, Complaint. Ethicon is a division of Johnson & Johnson. *Id.* The Complaint never specifically says what medical devices were “implanted” into Ms. Sherwood other than it was some type of vaginal mesh manufactured by Ethicon and AMS.

The Complaint alleges that Stamford Hospital underreported injuries from unspecified vaginal mesh to an unspecified person or entity although it seems likely that plaintiffs are referring to the Food and Drug Administration. ¶¶ 34-35, Complaint. The Complaint also alleges that Stamford Hospital failed to warn “healthcare providers” and “the patients” that the unspecified vaginal mesh was defective. ¶35, Complaint.

Years after Ms. Sherwood’s surgery, the FDA “issued a Public Health Notification” dated October 20, 2008 about vaginal mesh describing “adverse events.” ¶37, Complaint. Plaintiffs allege that Stamford Hospital failed to do “adequate testing and research” to “determine and evaluate the risks and benefits” or unspecified pelvic mesh. Stamford Hospital apparently did not properly train the surgeon, whoever that is, who performed Ms. Sherwood’s surgery. ¶42, Complaint. The Complaint has a laundry list of claims under the CPLA from warranty, to in adequate distribution (whatever that is), to improper “promotion” and “sale” to failure to “properly warn.” ¶¶61-63, Complaint.

Ms. Sherwood and her husband assert a single claim under the CPLA, Conn. Gen. Stat. § 52-572m et seq.. See Count One heading and paragraph 79.

ARGUMENT

I. The CPLA Claim Should Be Stricken Because A Hospital Is Not A Product Seller of Medical Devices Used in Surgery

While no one can tell from this Complaint what the product at issue is or the name of the physician who performed the surgery, the fact remains that a hospital is not liable under the CPLA for medical devices used in surgery.¹ In Zbras v. St. Vincent’s Medical Center, 91 Conn.

¹ Product liability claims are governed by the CPLA. See Conn. Gen. Stat. § 52-572m et seq. A “product liability claim” includes all claims against a product seller for personal injury, death or property damage caused by the manufacture, design, formula, preparation, assembly, installation, testing, warning, instructions, marketing, packaging, or labeling of any product. Conn. Gen. Stat. § 52-572m(b). A product liability claim under the CPLA is

App. 289 (2005), a surgeon used pedicle screws in a surgery at St. Vincent's Medical Center and the patient sued St. Vincent's under the CPLA as a product seller. The Superior Court granted summary judgment for St. Vincent's holding that "hospitals are not engaged in the business of selling equipment utilized in operative procedures but rather are engaged in the business of providing medical services, and therefore the defendant is not subject to the product liability act for providing the TSRH hardware." Zbras v. St. Vincent's Med. Ctr., 2002 Conn. Super. LEXIS 878 (Conn. Super. Ct. Mar. 20, 2002).² That opinion was "Affirmed" by the Appellate Court holding that "defendant can bill for goods provided incidental to surgery without being the business of selling goods." In affirming the Superior Court's decision, the Appellate Court also found that the "transaction in this case, a surgery, clearly was labeled a service rather than the sale of a product." Zbras v. St. Vincent's Medical Center, 91 Conn. App. at 294.³ The Zbras holding is consistent with all of the other precedent.

As one judge observed last year, "[f]ollowing Zichichi⁴ there have been what appears to be a **unanimous chorus** of appellate and trial court decisions, either barring product liability claims against hospitals or defining 'product' in a manner hospitable to hospitals." (Emphasis added). O'Dell v. Greenwich Healthcare Services, Inc., 2013 Conn. Super LEXIS 972, *7

the exclusive remedy against product sellers for damage to property, including the product itself, and personal injury or wrongful death caused by a product. Conn. Gen. Stat. § 52-572n.

² There are no material differences between Zbras and this case as both involved medical devices used in surgery.

³ The holding in Zbras is consistent with the Appellate Court's prior decision in Truglio v. Hayes Construction Co., 66 Conn. App. 681, 685 (2001). In Truglio, where the plaintiff claimed that a sidewalk was a product under the CPLA, the Court analyzed the meaning of the term "product seller" and found that: "[t]he essence of the relationship between the defendant and the buyer was the furnishing of a service, not the sale of a product, because the sidewalk was composed of concrete that was transported in liquid form to the site and then used by the defendant to pour the sidewalk." Id.

⁴ Zichichi v. Middlesex Memorial Hospital, 204 Conn. 399, 403-405 (1987) held that because the provision of blood at a hospital is a medical service rather than a sale of a product, the [Product Liability] Act did not apply. Id. The Zichichi Court went on to hold that "once a particular transaction is labeled a 'service,' as opposed to a 'sale' of a 'product,' it is outside the purview of our product liability statute." Id. Similarly, here, it is beyond dispute that the operation performed on the plaintiff at Stamford Hospital is properly characterized as a service, and the furnishing of surgical equipment and supplies, including Pelvic Mesh Products, is incidental to that service.

(Conn. Super. Ct. April 25, 2013).⁵ See also, Ferguson v. EBI Medical Sys., 1995 Conn. Super. LEXIS 2228, *11 (Conn. Super. Ct. Aug. 1, 1995)(Dismissing CPLA claim against Lawrence Memorial Hospital for injury arising from surgery using Pennig wrist fixators “because hospitals are providers of medical services rather than sellers of the products and equipment they furnish.” Citing cases going back to 1980, the Court found that “every hospital-defendant that has challenged a complaint brought against it under the [C]PLA by means of a motion for summary judgment was successful on that motion.”); Wallace v. Gerard Medical, Inc. 2003 Conn. Super LEXIS 1114, *12 (Conn. Super Ct. April 4, 2003)(Hospital not liable for defective porta cath under the CPLA because “a hospital is not a product seller pursuant to § 52-572m(a), but rather is engaged in providing a medical service”); Herrick v. Middlesex Hospital, 2005 Conn. Super LEXIS 1672, *19 (Conn. Super. Ct. June 27, 2005)(Hospital not product seller under CPLA for defective Russell-Taylor femoral locking nail inserted into plaintiff during surgery); Zelle v. Bayer Corp., 2012 Conn. Super LEXIS 892 (Conn Super. Ct. February 2, 2012)(Court granted summary judgment in favor of Danbury Hospital which used allegedly defective product as part of magnetic imaging test because it was not a product seller); O’Dell v. Greenwich Healthcare Services, Inc., 2013 Conn. Super LEXIS 972, *13 (Conn. Super. Ct. April 25 2013)(“[D]elivery of neuraxion medication to O’Dell was part of the medical services rendered by Greenwich Hospital for pain therapy This was a service under the overwhelming Connecticut case law.”).

Courts on a national basis also do not hold hospitals liable for defective products used during surgery. See 1-5 Products Liability § 5.11 ([P]hysicians, dentists, optometrists,

⁵ In contrast to this “unanimous chorus” of precedent, there is a single case where summary judgment was denied without opinion because the judge found that there was an issue of fact whether Stamford Hospital was a product seller. See Farrell v. Johnson & Johnson, UWY-CV11-6014102-S. In the Farrell summary decision, the Court did not explain what the issue of fact was or the basis for its decision.

pharmacists . . . and other healthcare professionals are generally not liable on product claims.

Hospitals, likewise, will not be subject to strict liability so long as the product involved relates to the professional treatment rendered.”) This treatise cites dozens of cases from around the country in support of this proposition.

Since there is no basis for the claim as a matter of law, it should be stricken.

CONCLUSION

For the foregoing reasons, the Motion to Strike should be granted.

**DEFENDANT,
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D/B/A STAMFORD HOSPITAL**

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CERTIFICATION

THIS IS TO CERTIFY THAT a copy of the foregoing was mailed, postage prepaid, by
U.S. Mail, this 19th day of September, 2014, to the following counsel of record:

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